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October Term, 1961

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No. 468

In the Matter of the Application

of

STEVEN I. ENGEL, DANIEL LICHTENSTEIN, MONROE LERNER, LENORE LYONS and LAWRENCE ROTH,

Petitioners-Appellants,

against

WILLIAM J. VITALE, JR., PHILIP J. FREED, MARY HARTE, ANNE BIRCH and RICHARD SAUNDERS, constituting the Board of Education of Union Free School District Number Nine, New Hyde Park, New York,

Respondents-Respondents,

directing them to discontinue a certain school practice,

and

HENRY HOLLENBERG, ROSE LEVINE, MARTIN ABRAMS, HELEN SWANSON, WALTER F. GIBB, JANE EHLEN, RALPH B. WEBB, VIRGINIA ZIMMERMAN, VIRGINIA DAVIS, VIOLET S. COX, EVELYN KOSTER, IRENE O'ROURKE, ROSEMARIE PETELENZ, DANIEL J. REEHIL, THOMAS DELANEY and EDWARD L. MACFARLANE,

Intervenors-Respondents.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICI CURIAE*

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Intervenors-Respondents.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICI CURIAE*

Interest of the *Amici*

This brief is submitted on behalf of the Synagogue Council of America and the National Community Relations Advisory Council pursuant to leave granted by the Court on March 5, 1962.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly of America, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The National Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

American Jewish Congress

Jewish Labor Committee

Jewish War Veterans of the United States

and sixty-one local Jewish Community Councils, including all the major cities in the United States.[1]

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership the overwhelming majority of Americans affiliated with Jewish organizations.

The organizations submitting this brief are committed to the belief that the absolute separation of church and state is the surest guaranty of religious liberty and has proved of inestimable value both to religion and to the community generally. We believe also that above all other institutions our public schools must be kept free of sectarian strife and involvement in religious practices and teachings.

For these and other reasons, we submitted a brief in *McCollum* v. *Board of Education of Champaign, Ill.*, 333

1. The constituent Community Councils are the following: Jewish Welfare Fund of Akron; Albany Jewish Community Council; Atlanta Jewish Community Council; Federation of Jewish Charities of Atlantic City, N. J.; Baltimore Jewish Council; Jewish Community Council of Metropolitan Boston; Jewish Community Council, Bridgeport, Conn.; Brooklyn Jewish Community Council; Jewish Federation of Broome County, N. Y.; Community Relations Committee of the Jewish Federation of Camden County, N. J.; Jewish Community Federation, Canton, Ohio; Central Florida Jewish Community Council; Cincinnati Jewish Community Relations Committee; Jewish Community Federation, Cleveland, Ohio; United Jewish Fund and Council of Columbus, Ohio; Connecticut Jewish Community Relations Council; Jewish Federation of Delaware; Jewish Community Council of Metropolitan Detroit; Eastern Union County, N. J., Jewish Community Council; Jewish Community Council of Easton and Vicinity; Erie Jewish Community Welfare Council; Jewish Community Council of Essex County, New Jersey; Jewish Community Council of Flint, Mich.; Jewish Federation of Fort Worth, Tex.; Community Relations Committee of the Hartford (Conn.) Jewish Federation; Jewish Community Council of Metropolitan Houston, Texas; Indiana Jewish Community Relations Council; Indianapolis Jewish Community Relations Council; Jewish Community Council, Jacksonville, Florida; Community Relations Bureau of the Jewish Federation and

U. S. 203 (1948). Because the decision of the New York courts in the present case challenges the continued validity of the principles declared in the *McCollum* case, we have sought and obtained the leave of the Court to submit this brief *amici curiae*.

Statement of the Case

This Court has granted certiorari to review a decision of the New York Court of Appeals which affirmed lower court decisions upholding the validity of the action of the Respondent School Board in instituting the practice of daily recitation in the public schools of the so-called "Regents' Prayer." The text of this prayer is as follows:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

Council of Greater Kansas City; Kingston, N. Y., Jewish Community Council; Community Relations Committee of the Jewish Federation—Council of Greater Los Angeles; Jewish Community Relations Council of Memphis; Milwaukee Jewish Council, Jewish Community Relations Council of Minnesota; Nashville Jewish Community Council; Jewish Federation of New Britain, Conn.; New Haven Jewish Community Council; Norfolk Jewish Community Council; Jewish Community Relations Council of Oakland, Calif.; Jewish Community Council of Paterson, N. J.; Jewish Community Council of Peoria, Ill.; Jewish Community Council, Perth Amboy, N. J.; Jewish Community Relations Council of Greater Philadelphia; Jewish Community Relations Council, Pittsburgh; Jewish Federation of Portland, Maine; Richmond Jewish Community Council; Jewish Community Council, Rochester, N. Y.; Jewish Community Relations Council of St. Louis; Community Relations Council of San Diego; San Francisco Jewish Community Relations Council; Jewish Community Council, Schenectady, N. Y.; Scranton-Lackawanna Jewish Council; Jewish Community Council of Toledo; Jewish Federation of Trenton; Tulsa Jewish Community Council; Jewish Community Council, Utica; Jewish Community Council of Greater Washington (D.C.); Jewish Federation of Waterbury; Wyoming Valley Jewish Committee; Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio.

Constitutional Provisions Involved

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The first section of the Fourteenth Amendment to the United States Constitution provides, in part:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Question Presented

The question presented to this Court is the constitutionality under the First and Fourteenth Amendments of the public school sponsored and conducted daily collective recitation of this prayer. Not involved in this case is the right of individual children to engage in private or individual prayer during public school hours in a manner which does not interfere with the regular conduct of public school operations. The constitutional issue in this case arises from the fact that state authorities formulated the prayer and have sponsored, promoted and supervised its collective recitation by the children as part of the regular daily activities of the public school day.

Summary of Argument

A lengthy opinion was written by the Special Term of the Supreme Court of New York. A majority of the Appellate Division affirmed the Special Term's decision on the basis of this opinion. In the Court of Appeals, however, three separate opinions for affirmance were written, no one of which received the acceptance of a majority of the Court. It is, therefore, not possible to state precisely on what particular ground the action of the Board of Education was sustained. As best we can judge from the various opinions, the action was sustained on four separate but somewhat related grounds:

(1) The prayer formulated by the Board of Regents of the State of New York is "non-sectarian," i.e., it is acceptable to all faiths and is preferential to none. Its recitation in concert by the children may constitutionally be made part of the daily public school program since the purpose of the First Amendment is only to preclude preferential treatment of some religions over others.

(2) Since provision is made for excusing from participation any child whose parents object to the recitation of the prayer, there is no infringement upon the First Amendment.

(3) The First Amendment is made applicable to the States by virtue of the Due Process clause of the Fourteenth. Public school recitation of prayer is a long-standing practice going back many years. A practice which has continued so long in time cannot be held to be wanting in due process.

(4) We are a religious people. Those who wrote our Constitution were the friends of religion. Exclusion of prayer from the public school curriculum manifests a hos-

tility to religion, and such motivation cannot reasonably be ascribed to the framers of our Constitution.

We submit that each of these grounds is erroneous. The prayer involved in this case is not "non-sectarian," for indeed no prayer can be truly non-sectarian. In any event, whatever may be the applicable rule under State law, the First Amendment, as interpreted by this Court, recognizes no distinction between sectarian and non-sectarian religion. All religious practices are equally barred in the public schools.

Nor is it constitutionally determinative that children of objecting parents may be excused from participation. In the first place, the privilege of non-participation is, by reason of the nature of the public school system and of children, illusory rather than real. In the second place, even if the privilege of non-participation immunizes the practice from invalidation under the "free exercise" clause of the First Amendment, the practice still infringes upon the Amendment's ban on laws respecting an establishment of religion.

The particular prayer here involved is of recent vintage. But even if the practice of communal prayer in public schools is of long duration, that fact does not render it constitutional. We would need no Constitution if whatever is necessarily ought to be.

Exclusion of communal prayer from the public school curriculum does not manifest a hostility towards religion, any more than does any application of the principle of the separation of church and state. Hence, such exclusion cannot be said to be contrary to the intent of those who framed the First and Fourteenth Amendments.

ARGUMENT

I. The action of the Respondent Board of Education constitutes a prohibited law respecting an establishment of religion.

A. The applicability of the First Amendment to the States

It is no longer open to question that the religion clause of the First Amendment to the Federal Constitution is applicable to the States no less than to the Federal Government. Moreover, its applicability extends equally to the no establishment and the free exercise provisions. The States and the Federal Government are therefore equally forbidden to enact or enforce any laws respecting an establishment of religion or prohibiting its free exercise. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Marsh* v. *Alabama*, 326 U. S. 501; *Everson* v. *Board of Education*, 330 U. S. 1; *McCollum* v. *Board of Education*, 333 U. S. 203; *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94.

B. The meaning of the no establishment clause

Four times within the past fifteen years this Court has spelled out the meaning of the no establishment clause in definitive terms. In the *Everson* case, *supra*, at pp. 15-16, again in the *McCollum* case, *supra*, at pp. 210-211; and yet again in *McGowan* v. *Maryland*, 366 U. S. 420 at 443, and finally within the past year again in *Torcaso* v. *Watkins*, 367 U. S. 488, at 493, this Court said:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force

> nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

If anything can be said to be settled in constitutional law it is that the First Amendment's no establishment clause means what this paragraph says it means. Measured by the standards thus set forth, the decision of the courts below, we submit, cannot stand.

C. The Regents' Prayer as preferential treatment

The courts below sought to meet the challenge based upon the ban on preferential treatment in the quoted paragraph by stressing the "non-sectarian" nature of the Regents' Prayer.[2] The error in this approach is twofold: First, the officially promoted acknowledgment of dependence upon God and the invocation of His blessings constitute a preference of theistic religions over non-theistic ones and, secondly, the engaging in public prayer constitutes a preference of those faiths which sanction the practice over those to which it is offensive.

2 See, e.g., opinion of Judge Froessel: "Here no partiality shown * * *. It [the prayer] * * * is clearly nonsectarian in language." 10 N. Y. 2d 174, at 183.

The acknowledgment of dependence upon Almighty God and the prayer to Him for His blessings necessarily constitute official assertion by the public school officials of the existence of a personal God who can and will respond to prayer and grant the blessings prayed for. This official assertion of a belief in the existence of God prefers some religions over others, specifically theistic religions over those which are non-theistic.

Nor is the "Regents' Prayer" acceptable to all religions that posit the existence of a personal God. For example, even among theistic religions, there are innumerable varieties and gradations of creed and doctrine concerning: (1) the very possibility of the Deity's present intervention in the course of creation (theologically denominated "special providence") and the conditions under which special providence may be hoped for without irreverance; (2) the propriety of addressing prayers to the Deity that seek to sway or influence the exertions of divine will; and (3) the propriety of assuming that the Deity, in dispensing blessings, can be induced to recognize the political boundaries of a specific country.

It is frequently assumed that all religions are founded upon a belief in the existence of a personal God. That is not so. So great a religion as the Buddhist religion with over 150 million adherents throughout the world including the United States (*World Almanac*, 1962, p. 719) is not founded upon a belief in the existence of God. Rhys-Davis, "Buddhism," in *Religious Systems of the World*, p. 142; Spielberg, *Living Religions of the World*, p. 247; Alabaster, *The Wheel of the Law*, p. XXXVII.

In *Washington Ethical Society* v. *District of Columbia*, 249 F. 2d 127, the United States Court of Appeals for the District of Columbia held unanimously that the Ethical Culture Society is a religious society and that Ethical Culture is a religion although it does not require "a belief and teaching of a Supreme Being who controls the universe." The Court ruled that a statute granting tax

exemption to "religious societies" must be construed to include the Ethical Culture Society. Indeed, the Court said, "To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to majority beliefs may well raise constitutional issues." As this Court pointed out in *Torcaso* v. *Watkins*, 367 U. S. 488: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."

Since religion may be non-theistic as well as theistic, governmental action which acknowledges dependence upon and asserts the existence of a personal God constitutes preferential treatment of some religions over others and is therefore unconstitutional. *Torcaso* v. *Watkins*, *supra*; *Fowler* v. *Rhode Island*, 345 U. S. 67. This Court's language in the *Torcaso* case is specific and unambiguous:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Even among those who believe in the existence of a personal God, the Regents' Prayer cannot be said to be non-sectarian. Indeed, no prayer publicly and collectively recited can be said to be non-sectarian.

Experience has shown that sooner or later so-called non-denominational religious exercises acquire sectarian additions and deviations. Moreover, what is non-denominational to the majority frequently is sectarian to the minority. Many Protestant public school authorities have designated

non-denominational the King James version of the Bible, which is unacceptable to Catholics, and the Lord's Prayer, which is unacceptable to Jews.

Children of different religions pray in different ways. Some kneel and cross themselves, some clasp their hands and bow their heads. Some pray with head covered and some with head uncovered. And to some all public oral prayer is objectionable.[3]

D. The Regents' Prayer as aid to all religions

Even if the Regents' Prayer were truly non-sectarian, its collective recitation under public school sponsoring would still be unconstitutional. The First Amendment, the Court held in *Everson*, *McCollum*, *McGowan* and *Torcaso*, as well as in *Zorach* v. *Clauson*, 343 U. S. 306, imposes upon government an obligation of neutrality not merely as between competing sects and faiths, but also as between religion and non-religion. Under the principles set forth in these cases, a government not only may not aid one religion or prefer one religion over another, but also may not "aid all religions."

3. The Quakers or Friends are the best known religious denomination which rejects all institutionalized or collective prayer. In the "Epistle to the Reader" prefixed to the "Great Mistery," of George Fox, the founder of the Quaker movement, Edward Burrough, who became a Quaker in 1652, wrote (cited in Hastings, Encyclopedia of Religion and Ethics (1914), Vol. VI, p. 143):

> In all things we found the light which we were enlightened with all * * * and so we ceased from the teachings of all men, and their words and their worship and their temples and all their Baptismes, and their Churches * * * and we met together often, and waited upon the Lord in pure silence, from our own words and all men's words and hearkened to the voice of the Lord * * * and while waiting upon the Lord in silence as often we did for many hours together * * * we received often the pouring down of the spirit upon us and we spake with new tongues, as the Lord gave us utterance and as his spirit led us * * *.

The application of this principle was spelled out in the *McCollum* case, wherein this Court said (333 U. S., at 207n):

> Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any one of the following reasons: (1) In actual practice certain Protestant groups have obtained an overshadowing advantage in the propagation of their faiths over other Protestant sects * * *
>
> In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend.

It is our contention that the prayer complained of in this suit accords to theistic faiths governmental advantages not enjoyed by non-theistic faiths or indeed certain theistic faiths. But *McCollum* and *Torcaso* make it clear that, even if all religions were equally accorded the favors of the public school system, the prohibitions of the First Amendment would be violated by the practice here challenged. That amendment imposes upon the state a mandate not merely of impartiality among competing faiths, but neutrality as between religion and non-religion. As the Court said in the *McCollum* case: "* * * a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any *or all* religious faiths or sects in the dissemination of their doctrines and ideals * * *." 333 U. S. at 211. The same thought was earlier expressed by the Court in the *Everson* case in its statement that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers * * *." 330 U. S. at 18.

Here too the conclusion is fortified by the *Zorach* case. There the released time statute and regulations that were attacked expressly provided that the program could be availed of by any "duly constituted religious body." 343

U. S. at 308n. Were the critical issue to have been sectarianism as against non-sectarianism, or aid to some religions as against aid to all religions, the provision for equality among all duly constituted religions would have then and there decided the controversy and there would have been no need for the Court to consider anything else. The Court would not have found it necessary to stress the fact that, "unlike *McCollum*," the released time program did not involve "religious instruction or devotional exercises" within public school classrooms (343 U. S. at 308-9). The Court could instead have simply relied upon the statutory provision for equality among all duly constituted religious bodies and have decided the case on that point. The fact that it did not do so establishes clearly that the non-preferential or non-sectarian aspect of the program was not deemed by the Court to be determinative.

It follows, therefore, that in the present case even if the Regents' Prayer were truly non-sectarian—which, we repeat, it is not—its collective recitation would nevertheless be unconstitutional as a law respecting an establishment of religion as that term has been defined by this Court.

II. The privilege of non-participation does not save the challenged practice from constitutional invalidity under the First Amendment.

A. Compulsion and voluntariness

While the issue of voluntariness vs. compulsion is perhaps relevant in respect to the attack on the practice involved in the present suit under the free exercise aspect of the First Amendment, it is completely irrelevant in respect to the establishment aspect. Here the critical test is not compulsion (although in respect to religious practices or teachings compulsion would violate the establishment ban as well as the free exercise guaranty), but state

aid to religion. Hence, even if pupil participation in the prayer were entirely voluntary—which we deny—the First Amendment's ban on establishment would still be violated by the aid accorded religion by the State through its public school system and by State participation in religious affairs.

This is one of the vital points of this case. It was stated clearly and unambiguously in this Court's opinion in the *McCollum* case. There the Court said:

> Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any one of the following reasons: * * *
> (2) the religious education program was voluntary in name only because in fact subtle pressures were brought to bear on the students to force them to participate in it; * * *
>
> *In view of our decision we find it unnecessary to consider these arguments* or the disputed facts upon which they depend. 333 U. S. 203 at 207n. (Emphasis added.)

With only one Justice dissenting, the Court held that the involvement by the Champaign public school authorities in religious education and practice was unconstitutional whether pupil participation was in fact voluntary or involuntary. The reason for this is that the Court found the Champaign program unconstitutional under the establishment ban and therefore did not find it necessary to consider the free exercise guaranty.

It is important to note that nothing in the *Zorach* case impairs the validity of this holding. On the contrary, the Court in *Zorach* went out of its way to make it clear that it was reaffirming, not overruling, *McCollum*. The majority opinion specifically stated "*no religious exercise or instruction is brought to the classrooms of the public*

schools." The public school, the opinion stated, "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. *No more than that is undertaken here.*" 343 U. S. at 311, 314. (Emphasis added.)

Thus, both *McCollum* and *Zorach* make it clear that, whatever may be the law in respect to "religious exercise or instruction" in the respective religious sanctuaries of the various faiths, "religious exercise or instruction" may not be "brought to the classrooms of the public schools," irrespective of any specific proof of compulsion or other non-voluntariness.

B. Establishment, free exercise and compulsion

The definitive interpretation of the establishment clause set forth in the *Everson*, *McCollum*, *McGowan* and *Torcaso* decisions, which we have quoted above, makes it clear that compulsion may effect a violation of that clause as well as of the free exercise clause. But not all compulsion necessarily violates the establishment ban; there are certain types of compulsion which will not constitute a law respecting an establishment of religion, and yet constitute one prohibiting the free exercise thereof.

The test, as elicited from the relevant decisions of this Court, is as follows: If compulsion is exercised to impel participation in *religious* conduct, it constitutes a law respecting an establishment of religion as well as one prohibiting the free exercise thereof. If, on the other hand, it impels participation in *secular* conduct, it can only be a law prohibiting the free exercise of religion.

Thus, as the cited cases state, it would be a violation of the establishment ban to "force * * * a person to go to * * * church * * * or * * * to profess a belief or disbelief in any religion." Going to church and professing belief in religion are obviously religious acts and coerced participation establishes religion no less than it prohibits its free exercise.

On the other hand, non-polygamous marriages (*Reynolds* v. *United States*, 98 U. S. 145); military training (*Hamilton* v. *Regents of the University of California*, 293 U. S. 245); vaccination (*Jacobson* v. *Massachusetts*, 197 U. S. 11); saluting the American flag and pledging allegiance to it (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624), abstaining from labor one day weekly (*McGowan* v. *Maryland*, *supra*) are all deemed by the general community and the courts to be secular rather than religious matters and compulsion with respect to them does not violate the ban on establishment of religion, although it may (or may not) violate the ban on laws prohibiting the free exercise of religion.

The distinction is a critical one. For if the act is secular it is within the constitutional competence of the State, and therefore the sole question remaining is whether a particular religiously motivated person has a constitutional right under the free exercise clause to be excused from participating therein. (This, according to a majority of this Court, depends upon the balancing of the secular needs of the community against the religious rights of the individual, and is not involved in the present case.) On the other hand, if the conduct is religious, then it is outside the competence and jurisdiction of the State or its instrumentalities, and even if participation were not compulsory the conduct would be unconstitutional.

It follows from this that the appropriate remedy will differ in the two types of cases. If only free exercise is involved in that the conduct is secular, the sole right of the religiously-motivated dissenter is to be excused from participation, but not to have the practice terminated. Conversely, if establishment is involved in that the conduct is religious, the constitutional redress is not to excuse the dissenter but to discontinue the practice (for the State has no constitutional power to enter into it in the first place).

An examination of the *Barnette*, *Everson*, *McCollum*, *Zorach*, *McGowan* and *Torcaso* cases, *supra*, will illustrate this distinction. In *Barnette*, the Court held that children of Jehovah's Witnesses could not be compelled by public school authorities to participate in the flag salute ceremony. Such coercion, it was held, prohibited the free exercise of their religion in a manner forbidden by the Constitution. Since, however, the ceremony is generally deemed a patriotic or secular one, rather than a religious one, there was no suggestion that the public school authorities were required to discontinue it as part of the regular public school program.

In *Everson*, the Court by a vote of 5 to 4, upheld the use of public funds to transport children by bus to private and parochial schools. The majority held that this was secular conduct whose purpose it was to protect children from the hazards of the road. (The Court interpreted the challenged statute to apply to all private schools, secular as well as religious.) Hence, there was no violation of the establishment ban, even though the public funds so expended were raised by compulsory taxation of citizens.

In *McCollum*, the conduct complained of was clearly religious. Hence, the Court did not issue a judgment which would simply have secured the right of the plaintiff's child not to participate in the religious program, but decreed that the conduct should be discontinued and eliminated.

In *Zorach*, a majority of the Court held that the gravamen of the plaintiffs' complaint was that public school sessions continued while off-premises religious instruction was taking place. Under this analysis of the case, the Court held that there was no violation of the establishment ban since the conduct—continuation of secular instruction—was purely non-religious.

In *McGowan*, the majority of the Court held that the present purpose of the challenged Sunday laws was to assure a common day of rest, recreation and family to-

getherness. This is obviously a secular purpose and the laws were therefore held not to violate the non-establishment clause.

In *Torcaso* v. *Watkins*, on the other hand, the purpose of requiring affirmation of a belief in the existence of God was clearly and exclusively religious. Hence, this Court held it beyond the competence of the State under the First Amendment.

In the present case, too, it is neither denied nor deniable that the purpose of the action of the Board of Education is religious. Being so, it is beyond the State's constitutional competence, and violates the no-establishment clause even if participation were entirely voluntary.

C. The fiction of voluntariness

We submit that the privilege of non-participation does not render the challenged practice voluntary or immune from invalidation under the free exercise clause of the First Amendment.

Non-physical coercion is well recognized in Anglo-American law. The concepts of "undue influence" in equity jurisprudence and the law of wills and testaments are illustrations of every-day applications of the principle that psychological coercion can be as effective in reality and as amenable to redress in law as physical coercion. A psychologically coerced confession is as inadmissible in a criminal case as one procured through physical force. *Chambers* v. *Florida*, 309 U. S. 227; *Malinski* v. *New York*, 324 U. S. 401; *Leyra* v. *Denno*, 347 U. S. 556.

In the area of the relationship of church and state, there is ample authority for giving judicial recognition and legal effect to non-physical coercion. In the *Everson* and *McCollum* cases, the Court stated that under the First Amendment a State may not only not "*force*" a person to participate in a religious act or profess a religious belief, but it likewise may not "*influence*" him to do so.

Particularly where children are involved, and particularly in respect to children who are in the public schools by the compulsion of law, non-physical coercion must be recognized as a dominant factor and a strong "influence." This was recognized by the four Justices joining in the concurring opinion of Mr. Justice Frankfurter in the *McCollum* case (333 U. S. at 227):

> * * * That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend * * *.

Other courts have recognized that the nominal privilege of non-participation in religious practices does not eliminate the element of "force or influence" or remove the punishment "for entertaining or professing religious beliefs or disbeliefs." Thus, 50 years ago, the Supreme Court of Illinois rejected the argument that pupils were free to exclude themselves from religious practices in the following words:

> That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351.

Twenty years earlier, the Supreme Court of Wisconsin made a similar observation:

When * * * a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such a cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others. *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 199-200.

An Iowa court came to the same necessary conclusion:

Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exercises, yet, surrounded as they were by a multitude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a responsible person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly opened door of the church, and receive, with their companions, the instructions there given? *Knoblauch* v. *Kromer*, 182 Iowa 691, 699-700.

See also: *Kaplan* v. *Independent School District of Virginia*, 171 Minn. 142, 155-156, dissenting opinion:

> To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage.

The most searching examination of the claim of voluntarism in respect to introduction of religious practices in the public school program was made in the case of *Tudor v. Board of Education of the Township of Rutherford*, 14 N. J. 31, 100 A. 2d 857, cert. denied 348 U. S. 816. There, speaking for a unanimous court, Chief Justice Vanderbilt, after examining the various authorities, overruled the contention of voluntarism on the ground that it "ignores the realities of life."

The Court's opinion contains the following (14 N. J. 31 at 50):

> Prof. Isidore Chein, Supervisor of Psychology and Acting Director of the Research Center for Mental Health at New York University, testified on behalf of the plaintiff:
>
> > "* * * I would expect that a slip of this kind, distributed under the authority of the school, would create a subtle pressure on the child which would leave him with a sense that he is not quite as free as the statement on that slip says; in other words, that he will be something of an outcast and a pariah if he does not go along with this procedure."
> >
> > "* * * I think that they would be in a situation where they have to play along with this or else feel themselves to be putting themselves in a public position where they are different, where they are not the same as other people, and the whole pressure would exist on them to conform."

There was a time when compulsion to participate in prayer recitation or other religious practices in the public schools was more patent and direct. On one occasion, before the Civil War, a hundred Catholic children were expelled from a Boston public school for refusal to participate. Whipple, *The Story of Civil Liberty in the United States*, p. 64 (1927). In Indiana, in the 1890's, a Catholic girl who refused to learn a chapter from the Bible as required but recited "Maud Muller" instead was kept after school day after day in what turned out to be a vain attempt to force her to violate her religious scruples. Beale, *A History of Freedom of Teaching in American Schools* (1941). Today, compulsion and pressure are more subtle and circumstantial but are no less present.

Children of minority religious groups particularly are faced with a dilemma whenever religion intrudes upon the public school—a dilemma which is always hard and frequently is cruel. They must either subject themselves to being singled out as non-conformists or they must participate in religious practices and teachings at variance with what they learn at home or in their religious schools. It is understandable that not infrequently some of them choose the second alternative as the lesser evil, and that Catholic and Jewish children will participate in Protestant religious practices in violation of their religious convictions and upbringing rather than subject themselves to the pain of not belonging.

We submit that under the guaranty of separation and religious freedom, American children may not be placed in this dilemma by public school authorities. They may not be compelled to choose between being forced or influenced to profess a religious belief or disbelief and being punished for refusing to profess such belief or disbelief. It was to avoid the oppression and bitterness which Old World experience had shown to be an inevitable concomitant of governmental intrusion in religion, that the fathers of our country gave constitutional protection to the principle

that "religion is wholly exempt from [government's] cognizance." *Madison's Memorial and Remonstrance Against Religious Assessment*, annexed as Appendix to *Everson*, 330 U. S. at 63. Religious compulsion and oppression, we submit, should not be allowed in the public schools even in a mild or subtle form.

The challenged practice requires school children to engage in an act of worship which conflicts with the conscience of some of them. The very bringing of this suit is proof of that fact. This Court should not place the seal of approval on such oppression.

III. The long standing of the practice of public school prayer is not constitutionally determinative.

The opinion of the Supreme Court at Special Term lays great stress on the fact that collective prayer in public schools is a long-standing practice (although concededly the Regents' Prayer is a comparatively recent innovation). From this the conclusion was drawn that it was not violative of due process.

This sanctification of the status quo is, we submit, erroneous. Due process does not mean that whatever is must necessarily continue to be.

Extended discussion of this ground for upholding the action of the Board of Education is not necessary here. The same assertion was made in *McCollum* and again in *Torcaso*. It was also made in a different context in *Brown* v. *Board of Education*, 347 U. S. 483. In all cases it was rejected.

In *McCollum*, this Court invalidated a practice, released time, that had been widely followed in the public schools of the country since 1914. Mr. Justice Frankfurter took occasion to say, in his concurring opinion, that "to the extent that aspects of these programs are open to Constitutional objection, the more extensively the movement

operates, the more ominous the breaches in the wall of separation" (333 U. S. at 225).

In *Brown* v. *Board of Education*, *supra*, the fact that racial segregation in the public schools had been universally practiced for as long as the Fourteenth Amendment had been part of the Constitution did not require a holding that it was sanctioned by the Constitution. Similarly, here the fact that prayer recitation is long-standing in many (but far from all or even most) schools does not require a holding that it is constitutionally permissible.

IV. The exclusion of collective prayer from the public school program does not manifest a hostility to religion.

Throughout the prevailing opinions of the court below is found the *motif* that exclusion of collective prayer is an act of hostility to religion and therefore could never have been intended by the framers of the First Amendment. This is most emphatically stated in the following language from the opinion of Judge Burke (10 N. Y. 2d 174, at 184):

> There is no language in the amendment which gives the slightest basis for the interpolation of a Marxist concept that mandates a prescribed ethic. According to the opinion, the separation of church and State which was intended to encourage *religious* interests among our people would become the constitutional basis for the *compulsory exclusion of any religious element* and the consequent promotion and advancement of atheism. It is not mere neutrality to prevent voluntary prayer to a Creator; it is an interference by the courts, contrary to the plain language of the Constitution, on the side of those who oppose religion.

This equation of opposition to religious practices in the public school with opposition to religion is unfortunately widespread. But its being widespread does not make it true.

This brief is submitted on behalf of the coordinating bodies of 70 Jewish organizations, including the national bodies representing congregations and rabbis of Orthodox, Conservative and Reform Judaism. The thousands of rabbis and congregations who have authorized the submission of this brief can hardly be characterized as being "on the side of those who oppose religion." Many Christian groups and publications have similarly expressed opposition to the Regents' Prayer.

The same argument was asserted in the *McCollum* case and the Court disposed of it in the following language (at pp. 211-212):

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

This statement is as applicable here as it was in *McCollum*. The practice challenged here, we submit, is in the long run harmful rather than beneficial to religion in general and to prayer in particular.

The stated purpose of the Board of Regents in formulating the challenged prayer and in urging its collective recitation daily in the public schools is to inculcate in the children an appreciation of the moral and spiritual values

shared by most Americans. But it is unreal to expect that an appreciation of moral and spiritual values can be communicated to our children by the rote recitation in the classroom of the prayer recommended by the Regents or of any other formalized prayer. Whatever is good and meaningful in prayer must inevitably be lost by its mechanical repetition in an atmosphere devoid of the religious spirit which only the home, church and synagogue can provide.

The prayer here under consideration is ordained not by religious authority but by public officials. It was formulated by a state agency, the Board of Regents, and imposed on the pupils by the respondent local school board. A similar effort to achieve a common denominator in religion—the proposal that schools teach the "common core" of all religions—has been aptly condemned by the American Council on Education in the following terms (American Council on Education, "The Relation of Religion to Public Education," p. 15 (1947)):

> The notion of a common core suggests a watering-down of the several faiths to the point where common essentials appear. This might easily lead to a new sect—a public school sect—which would take its place alongside the existing faiths and compete with them. The great religious bodies in America hold their respective faiths too seriously to admit of such a procedure on the part of the public schools.

Conclusion

Since the adoption of the First Amendment, the United States has escaped much of the bitter religious conflict and sectarian strife which have riven other parts of the world and driven men to violence and bloodshed. That good fortune has been due in no small part to two of the truly great contributions the American people have made to

western civilization: the concept of the separation of church and state and the free public school system. The first, by protecting religion against the intrusion of civil authority and by making it impossible for the state to become a battleground for sectarian preference and favor, has preserved both our political freedom and our religious freedom. The second, by providing for the education of our children on terms of complete equality and without cognizance of their differences in religious beliefs or disbeliefs, has been the cornerstone of our American democracy. The intrusion of religion upon the public school system, as we have shown in this brief, both threatens the separation of church and state and challenges the traditional integrity of the public schools. That intrusion, if permitted and sanctioned as sought by respondents, will greatly endanger the institutions which have preserved religious and political freedom in the United States and which have prevented religious warfare in this nation. We believe that continued preservation of the victory which the Fathers of the Constitution won for political and religious liberty requires reversal of the judgment herein.

Respectfully submitted,

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